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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Federal Communications Commission
Office of Secretary

| | | |
|---|---|---------------------|
| In the Matter of |) | |
| |) | |
| Arkansas Cable Telecommunications |) | |
| Association; Comcast of Arkansas, Inc.; |) | EB Docket No. 06-53 |
| Buford Communications I, L.P. d/b/a |) | |
| Alliance Communications Network; |) | |
| WEHCO Video, Inc.; and TCA Cable |) | EB-05-MD-004 |
| Partners d/b/a Cox Communications, |) | |
| |) | |
| <i>Complainants,</i> |) | |
| |) | |
| v. |) | |
| |) | |
| Entergy Arkansas, Inc., |) | |
| |) | |
| <i>Respondent.</i> |) | |
| |) | |

To: The Commission

REPLY TO OPPOSITION OF APPLICATION FOR REVIEW

1. Pursuant to 1.115¹ of the Rules of the Federal Communications Commission ("FCC" or "Commission"), Entergy Arkansas, Inc. ("EAI"), hereby submits this Reply to the June 5, 2006, Opposition filed by the Arkansas Cable Telecommunications Association *et al.*²

¹ 47 C.F.R. § 1.115.

² Arkansas Cable Telecommunications Association, Comcast of Arkansas, Inc., Buford Communications I, L.P. d/b/a Alliance Communications Network, WEHCO Video, Inc., and TCA Cable Partners d/b/a Cox Communications are collectively referred to herein at "Complainants."

with respect to EAI's Application for Review of the jurisdictional determinations of the Hearing Designation Order ("HDO") issued in the above-referenced docket on March 2, 2006.³

I. INTRODUCTION

2. EAI's Application for Review is timely filed, and illustrates that the Enforcement Bureau's ("Bureau's") determination of the FCC's jurisdiction to address EAI's safety and engineering practices exceeds the permissible scope of the Pole Attachments Act. Complainants' Opposition fails to rebut the clear statutory requirement that the FCC's review must be tied to the "pole attachment" itself. The HDO, however, goes well beyond this limitation and attempts to extend the ability of the FCC to examine EAI's practices even to those areas and policies in which EAI is managing its electric assets and acting in its capacity as an electric utility. The HDO's broad statement has no support in the Pole Attachments Act, and is not supported in the FCC's precedent. Accordingly, the FCC should grant EAI's Application for Review, and reverse the Bureau's jurisdictional determinations contained in the HDO.

II. DISCUSSION

A. EAI's Application for Review is Timely and Appropriate

3. Complainants assert that EAI's Application for Review is untimely and/or otherwise procedurally defective because it is actually an Application for Review of a Hearing Designation Order that should have been brought under section 1.115(e)⁴ of the FCC's rules, either through a request for immediate certification from the Administrative Law Judge ("ALJ")

³ *Hearing Designation Order*, DA 06-494, 21 FCC Rcd 2158 (rel. Mar. 2, 2006), 71 Fed. Reg. 20105 (Apr. 19, 2006); *Erratum* (rel. Mar. 6, 2006).

⁴ 47 C.F.R. § 1.115(e).

or at the conclusion of the hearing once the ALJ's initial decision is filed.⁵ However, Complainants' simplistic view of rule 1.115 relies on the mere fact that the Order is titled a "Hearing Designation Order" and fails to address the fact that the jurisdictional ruling in the HDO bears the hallmarks of a final decision immediately appealable to the Commission.⁶

4. Complainants further argue that FCC review of the HDO at this time would constitute an unwarranted "piecemeal" review of the Bureau's action, but to do otherwise would run the risk of being deemed "untimely" at the end of the process.⁷ Moreover, while *Algreg* suggests that "piecemeal" review is disfavored where *interlocutory* rulings are at issue, *Algreg* makes equally clear that the nomenclature of an order is not determinative of the nature of its finality.⁸ To suggest otherwise would be to "exalt form over substance."⁹

5. Rather, the action taken by the Bureau in denying EAI's jurisdictional arguments in the nominal HDO bears the indicia of a final action under delegated authority, in that the Bureau (1) purported to resolve the jurisdictional question as a "threshold" issue; (2) *declined* to designate EAI's jurisdictional issues for hearing and opted to "decide" them instead in the HDO; and (3) included a separate ordering clause denying EAI's request to dismiss on jurisdictional

⁵ Opposition to Application for Review, EB Docket No. 06-53, EB-05-MD-004, at 2-6 (filed June 5, 2006) ("Opposition").

⁶ Application for Review, EB Docket No. 06-53, EB-05-MD-004, at ¶¶ 3-5 (filed May 19, 2006) ("Application for Review"); 47 C.F.R. §§ 1.115(a), (d).

⁷ Opposition at 9.

⁸ *Algreg Cellular Engineering*, 12 FCC Rcd 8148, 8157 ¶ 21 (1997).

⁹ *Id.*

grounds.¹⁰ In light of these elements, which Complainants' fail to rebut, EAI's Application for Review is timely and appropriate for Commission consideration at this time.¹¹

6. That the erroneous jurisdictional ruling of the HDO yielded inappropriate issues for hearing does not undercut the finality of the Bureau's determination as suggested by Complainants.¹² Rather, it emphasizes the fact that the Bureau's jurisdictional determinations are foundational, and should be addressed on an immediate basis.

B. The Bureau's Jurisdictional Determinations Must be Reversed

7. It is telling that Complainants' Opposition does not respond to EAI's arguments regarding the statutory requirement under Section 224(b)(1) that exercise of the FCC's jurisdiction must be tied to the "pole attachment" itself.¹³ Indeed, they cannot respond because to do so would expose the fact that the broad jurisdictional pronouncements of the HDO and the relief the Complainants' seek *would* require the ALJ to divorce himself from the review of the relationship between the attacher and the pole owner and to instead examine EAI's business and engineering practices independent of any reference to the core of the Pole Attachments Act – the pole attachment itself. In this respect, Complainants' own characterization of what it understands the HDO to require of the ALJ is pertinent, in that Complainants' assert that the ALJ must "examine Entergy's electric construction, engineering and safety practices" in order to

¹⁰ HDO at ¶¶ 7, 12, 24; *Algreg* at ¶ 21(delineating factors that indicate whether an HDO includes a distinct conclusion of law that is final and immediately appealable).

¹¹ 47 C.F.R. §§ 1.115(a), (d)

¹² Opposition at 10.

¹³ Application for Review at ¶¶ 13-14.

fulfill the HDO and the “scope of the examination [by the ALJ] properly includes an analysis of Entergy’s own electric utility safety practices.”¹⁴

8. Rather than address the clear statutory limitation on this type of an inquiry, Complainants’ parrot the HDO and suggest that because the Pole Attachments Act addresses safety and generally applicable engineering standards with respect to access to utility distribution poles,¹⁵ that this provides the Commission with carte blanche to investigate and dictate the manner in which an electric utility manages its infrastructure when it is operating as an electric utility. This endeavor, however, is well beyond the FCC’s narrow ability to address rates, terms and conditions for “pole attachments,” and must be rejected.

9. With respect to FCC precedent in this area, the cases cited by Complainants do not support the proposition that the FCC is empowered to establish utility engineering practices or examine EAI’s management of its own electric plant. While the *Local Competition Order* suggests that the FCC may wish to consider addressing engineering standards for attachers, *it did*

¹⁴ Opposition at 18. In this respect, EAI also notes that Complainants are attempting to reinvent their theory of the case to suggest that not only do they seek to have the Commission prohibit engineering standards that differ from the NESC, but they also suggest that a discrimination claim may be brought against EAI for requiring Complainants to remedy their engineering violations where EAI has allegedly failed to remedy their own engineering lapses. They go so far as to suggest that if EAI is not maintaining its plant when EAI is responsible for the bill, *Complainants should not be required to remedy their safety violations even where no dispute as to their responsibility*. Opposition at 16. This awkward “clean hands” theory is present nowhere in the Complaint filed in this docket, nor is it supported by the HDO. See, HDO at ¶ 18, Issue 6 (designating for hearing the issue of whether EAI discriminated against Complainants in favor of other *communications* companies)(emphasis added). Nor is such a suggestion even permissible under the Pole Attachments Act. See, 47 U.S.C. § 224(f)(1) (requiring nondiscriminatory access for cable television systems and telecommunications carriers); *Local Competition Order* at ¶ 1168 (Section 224(f)(1) “prohibits a utility from favoring itself or its affiliates with respect to the provision of telecommunications and video services); *Order on Reconsideration*, 14 FCC Rcd 18049, ¶ 9 (1999). In any event, Complainants assertions here only serve to underscore the overbreadth of the Bureau’s statement of its jurisdiction.

¹⁵ Opposition at 13.

not do so at the time and there are no existing FCC standards that are “in conflict” with a state or industry standard that EAI prescribes for its attachers.¹⁶ That the *Local Competition Order* may suggest that the FCC could choose to try to set engineering standards at some unknown point in the future is not the same as an affirmative finding of current jurisdiction, or the authority to exercise such jurisdiction in the manner that the HDO attempts. In particular, the jurisdictional statement of the HDO, and the manner in which that statement was applied in the HDO with respect to the issues for the ALJ to consider, will result in the *de facto* setting of a global limit on EAI’s engineering standards and those of other utilities. Apart from going well beyond the FCC’s statutory grant of authority, the HDO’s pronouncements are thus also well beyond any prior FCC precedent.

10. The fallacy of Complainants’ suggestion that *CTAG* and *Newport News* affirmatively establish FCC jurisdiction over electric utility engineering practices was addressed in EAI’s Application for Review,¹⁷ and Complainants’ cursory assertions to the contrary in its Opposition do not refute EAI’s arguments.¹⁸ Nor is Complainants’ reliance on *Cable Texas* to support its assertion that the FCC may regulate electric operations justified.¹⁹ *Cable Texas* clearly related to *counting the number of cable attachments* to determine rental fees due, and in no way addressed utility’s engineering standards or the FCC’s judgment as to its authority to set such standard.

¹⁶ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶¶ 1143-1150 (1999).

¹⁷ Application for Review at ¶ 24.

¹⁸ Opposition at 12.

¹⁹ Opposition at 12.

11. Complainants' also fail to address the fact that the Bureau's overbroad statement of its authority over electric utility engineering practices not only exceeds the language of the Pole Attachments Act, but also impugns the authority of state public service commissions and utilities themselves to adequately address highly localized and complex safety and engineering issues.²⁰ As EAI has consistently argued, state public service commissions, including the Arkansas PSC, possess the authority and the expertise to address engineering standards employed by both electric utilities and communications companies operating within their jurisdiction. Nor does the language of the Pole Attachments Act or Commission precedent suggest that this state authority has been diminished. A primary example of this is evidenced by the recent actions of the Florida Public Service Commission in response to Hurricanes Katrina, Rita and Wilma, in which the Florida PSC adopted pole inspection cycles in response to local concerns related to pole strength, pole attachment burdens, unauthorized attachments and other engineering concerns that arise in extreme weather conditions such as hurricanes.²¹ Like Arkansas, Florida has *not* certified to the FCC that it regulates pole attachments,²² but clearly acted to address local concerns related to pole attachment engineering, utilizing its unique understanding of local utilities issues and Florida's unique weather conditions. Such issues are easily within the grasp of these local regulators, and both as a matter of law and as a matter of policy they should remain so.

²⁰ Application for Review at ¶¶ 16-21.

²¹ See, In re Proposal to Require Investor-Owned Electric Utilities to Implement Ten-Year Wood Pole Inspection Program, Docket No. 060078-EI, Order Nos, PSC-06-1-0144-PAA-EI (Feb. 27, 2006), PSC-06-0251-CO-EI (Mar. 24, 2006).

²² *States That Have Certified That They Regulate Pole Attachments*, Public Notice, DA 92-201, 7 FCC Rcd 1498 (1992).

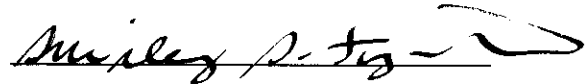
III. CONCLUSION

12. Complainants' characterization of the state of EAI's plant and its purported motives or strategy for pursuing an appeal of the Bureau's erroneous determinations are inappropriate, speculative and ultimately irrelevant. Moreover, Complainants' consistent use of inflammatory rhetoric to obscure the issues is ultimately unavailing. EAI's Application for Review is timely, and legitimately seeks to restrict the HDO and the Bureau's actions to the clear limits of the Pole Attachments Act, the FCC's own precedent, and the record in this case.

WHEREFORE, THE PREMISES CONSIDERED, Entergy Arkansas, Inc.

respectfully requests that the FCC take action in this matter as requested in the Application for Review, and reverse the jurisdictional determinations of the HDO as *ultra vires*.

Respectfully submitted,



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Dated: June 15, 2006

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CERTIFICATE OF SERVICE

I, Erika E. Olsen, do hereby certify that on this 15th day of June, 2006, a single copy (unless otherwise noted) of the foregoing "Reply to Opposition to Application for Review" was delivered to the following by the method indicated:

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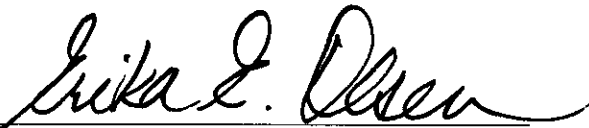
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